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No. 573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

GOVERNOR CLAUDE R. KIRK, JR., ET AL., *Appellants*

v.

ROBERT H. HARGRAVE, ET AL., *Appellees*

On Appeal From the United States District Court for the Middle District of Florida

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MEMORANDUM FOR APPELLEES

GLASSIE, PEWETT, BEEBE & SHANKS
By
HERSHEL SHANKS
ALLAN I. MENDELSOHN
ROBERT M. PERCE, JR.
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

RICHARD H. FRANK
918 Marine Bank Building
Tampa, Florida 33602

Attorneys for Appellees

DAVID RUBIN
1201 Sixteenth Street, N. W.
Washington, D. C. 20006
Of Counsel

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MEMORANDUM FOR APPELLEES

In appellees' view, the decision of the three-judge court below is eminently correct; we nevertheless believe that the decision merits plenary review by this Court because approximately 34 states have laws substantially identical to the one declared unconstitutional below and because the area of the law involved in this case is in need of doctrinal clarification.

STATEMENT OF FACTS

This suit attacks, under the Equal Protection Clause, a Florida statute commonly referred to as the "Millage Rollback Act," which provides that any county that imposes on itself an *ad valorem* property tax in excess of 10 mills for educational purposes will not be eligible to receive state funds to support its educational system.[1] For the school year immediately prior to the passage of the Millage Rollback Act (the school year of 1967-68), 24 Florida counties had imposed on themselves *ad valorem* property taxes in excess of 10 mills for educational purposes. As a result of the passage of the Millage Rollback Act, each of these counties reduced its school taxes to 10 mills[2] for subsequent years to avoid losing state funds for its educational system.

Appellees attack the statute as a *de facto* wealth discrimination because, although it authorizes the poorest Florida county to tax itself only $52 per pupil, it authorizes the richest Florida county to tax itself as much as $725 per pupil. This limitation is placed on the poorer counties even though they are willing to sacrifice in order to provide better school systems for their children by taxing themselves at a higher rate than richer counties do. A limitation on the tax rate a local jurisdiction may impose for educational purposes is unconstitutional, say appellees, if the limitation is fixed by reference to a standard which relates solely to the amount of property in the

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[1] The Millage Rollback Act is F.S.A. § 236.251, which provides in pertinent part as follows:

> Effective July 1, 1968, each county board of public instruction desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the nonexempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

[2] Plus minor adjustments not here relevant.

county, rather than to the educational needs of the county. In short, a limitation based on the amount of property in the county effects a discrimination based on wealth which is unsupported even by a rational justification, and surely is not supported by a compelling state interest.[3]

The three judge district court agreed.[4] Finding it unnecessary to decide whether the rational basis test or the compelling interest test was applicable, the court found that the Millage Rollback Act had not even a rational justification. The court stated:

> What rational basis can be found for the distinctions that are inherent in the Act? . . . What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties? . . . We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act.
>
> While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it "may not accomplish such a purpose by invidious discrimination between classes of its citizens." *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) [App. 15].

THE IMPORTANCE OF THE CASE

1. The importance of the decision below is emphasized by the fact that similar tax limitations exist in a large number of states. According to a 1965 study, 34 states limited the authority of local taxing units to fix tax

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[3] See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) and *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969).

[4] A single judge initially dismissed the case on jurisdictional grounds. After reversal by the Court of Appeals for the Fifth Circuit (*Hargrave* v. *McKinney*, 413 F.2d 320 (1969)), the same judge joined in the ruling on the merits that the statute in issue is unconstitutional.

rates for educational purposes by reference to a specific maximum number of mills (or to a specified maximum percentage applied to assessed valuation).[5] All of these limitations are now drawn into question—and properly so.

Some states, wishing to apply a limit to taxing authority for school purposes, have done so in terms of a constitutionally permissible standard, such as a specific number of dollars per pupil.[6] However, the majority of states continue to use a standard based on the value of property in the taxing unit, despite the fact that, as the court below found, this plainly discriminates against the poorer taxing units.

Because the decision in this case will control rulings on similar statutes in so large a number of states, we believe plenary review of this issue is warranted.

2. The status of *de facto* wealth discrimination as a constitutionally invidious classification is in need of clarification by this Court.

On March 25, 1969, this Court affirmed *per curiam* on jurisdictional papers the dismissal of a complaint which charged *de facto* wealth discrimination in the school financing laws of Illinois. *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969), *affirming mem.*, *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) (Mr. Justice Douglas would have noted probable jurisdiction). In effect, this Court in *McInnis* rejected without trial an allegation based on the contention that the Illinois school financing laws were unconstitutional because they necessarily resulted in higher

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[5] M. K. Remmlein, *Tax Limitation Laws* (National Education Association, Committee on Educational Finance, 1965), p. 9. Not all of these statutes required rollbacks, since the maximums have been in effect for far longer periods than the Florida maximum involved in this case.

[6] Remmlein, *op. cit.*, p. 9.

per pupil expenditures in wealthier districts. Whether this per curiam affirmance represents the considered view of this Court on the issue of *de facto* wealth discrimination or whether it is tantamount to a denial of certiorari is a much mooted question among scholars and the bar.[7] In any event, one month later this Court, in explicit dicta looking in precisely the opposite direction, stated that discrimination based on wealth is "highly suspect" and that when such a classification is under attack pursuant to the Equal Protection Clause it is subject to the higher standard of review which has become known as the compelling interest test. *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 807 (1969). However, thereafter in February, 1970, the Court again affirmed *per curiam* on jurisdictional papers a case almost indistinguishable from the *McInnis* case. *Burruss* v. *Wilkerson*, 396 U.S. 44 (1970), *affirming mem.*, 301 F. Supp. 1237 (W. D. Va. 1969) (Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction).

Of course, it is possible for a lower court to conclude that *McInnis* and *Burruss* should be limited to their facts or that such affirmances, made on sparse jurisdictional papers, must be interpreted as having been decided on the narrowest possible ground.[8] Or in particular cases such as the instant one, *McInnis* and *Burruss* may be distinguishable on their facts, as the district court found in

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[7] The *McInnis* case and its meaning are discussed in John E. Coons, et al., *Private Wealth and Public Education* (Harvard University Press, 1970) pp. 305-306, 311-315; Silard and White, "Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause," 1970 *Wis. L. Rev.* 7 (1970); Michelman, "Forward: On Protecting the Poor Through the Fourteenth Amendment," 83 *Harv. L. Rev.* 7 (1969); and Shanks, "Equal Education and the Law," 39 *American Scholar* 255 (Spring, 1970).

[8] See authorities cited in previous footnote.

this case.[9] However, we believe that this case may provide the Court with a vehicle for clarification of the status of the *de facto* wealth discrimination as a constitutionally invidious classification, while a *per curiam* affirmance of the decision below would only add to the already existing confusion and uncertainty in this area.[11]

For these reasons, we believe the Court should note probable jurisdiction.

Respectfully submitted,

GLASSIE, PEWETT, BEEBE & SHANKS

By

HERSHEL SHANKS
ALLAN I. MENDELSOHN
ROBERT M. PERCE, JR.
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

RICHARD H. FRANK
918 Marine Bank Building
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1201 Sixteenth Street, N. W.
Washington, D. C. 20006
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[9] However, it may be noted that the lower court in *McInnis*, in addition to its other rulings, sustained the same kind of maximum limitation which the lower court struck down in the case at bar, 293 F.Supp. at 333, although the correctness of this ruling was not raised on appeal to this Court.

[10] See, for example, Judge Friendly's citation of the *McInnis* case in *McMillan* v. *Garlick*, — F.2d — (C.A. No. 34709, 2d Cir., decided August 3, 1970), Slip Op. 4071, n.5.

[11] Of course a *per curiam* affirmance would by its precedential force alone control decision as to the 34 states which have maximum tax limits based on property values in the taxing unit.